FRONT Report LINE

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20-Hour Hold Rule clarified

A RECENT FEDERAL COURT decision helps end confusion over intent of the 20-Hour Hold Rule. In *U.S. v. Roberts*, 928 F.Supp. 910 (W.D. Mo. 1996), the court held that under the rule a seizure by police was unlawful because officers did not have probable cause to arrest.

Federal agents asked state police officers to seize and hold a suspect to photograph, fingerprint and interrogate her. Officers indicated she was "detained" and not arrested, although she was treated like anyone placed under custodial arrest.

Officers often have misinterpreted the purpose of the rule, set forth in 544.170, RSMo. They erroneously thought the rule allowed them to seize and "hold" a suspect for up to 20 hours for investigative purposes, even if they lacked probable cause to arrest.

The rule simply places a time limit on a lawful, custodial arrest. It limits how long a person can be arrested and placed in jail without an arrest warrant or some other finding of probable cause by a judge.

Even if a warrant is not obtained within 20 hours, the charges do not have to be dropped. However, the defendant cannot be jailed for more than 20 hours unless the officer has obtained a warrant.

THE CONSTITUTION forbids an officer from making any seizure or detention without a reason. There are only two types of seizures (A 20-hour hold is not a seizure.):

- **An arrest,** with or without a warrant, if probable cause exists.
- **A Terry stop,** or investigative detention, if there is reasonable suspicion criminal activity exists.

New state laws impact law enforcement

Drunken driving law may make it harder to prosecute

A LITTLE-NOTICED CHANGE made in the drunken driving law during the last legislative session may greatly impact prosecution of drunken driving cases.

House bills Nos. 1169 and 1271 redefines driving or operating a motor vehicle while intoxicated by omitting "in actual physical control."

Previously, an operator was considered as the one "in actual physical control" of the vehicle. An officer did not have to see a person driving for there to be sufficient evidence to support a conviction.

Under old law, the drunk sitting behind the wheel of a stalled vehicle was "operating" a vehicle and guilty of drunken driving. Also, through reasonable inference, the drunk sitting behind the wheel of a car involved in an accident was "operating" the car.

THE REVISED LAW does not necessarily change a municipal ordinance on drunken driving and should not change municipal prosecutions or convictions.

The new law does not allow for reasonable inference. To obtain a drunken driving conviction, the

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"Resisting arrest" expanded

A NEW LAW this year makes it a crime to resist lawful detention by an officer, even for writing a traffic citation. The law also applies to those who flee or resist a stop for an infraction.

Until now, there was no criminal penalty for a motorist or suspect who refused to submit to lawful detention.

House Bill No. 1047 changed that by amending Section 575.150, RSMo., which had provided that a person could be guilty of the crime of resisting arrest **only** if the officer was attempting to make a custodial arrest.

Previously, cases in which a

SEE RESISTING, Page 2

AG's Office seeks speedier justice for killers

FOLLOWING AN 8th Circuit Court of Appeal's order, a district court judge finally ruled on a death row appeal filed six years ago by a man who killed a state trooper.

Jerome Mallett shot veteran trooper James Froemsdorf after a traffic stop in Perry County in 1985.

In August, the judge denied Mallett's habeas corpus petition, which requires a court to review an inmate's claim of wrongful imprisonment.

The ruling came after the AG's Office asked the 8th Circuit to step in and compel the district court judge to rule on Mallett's habeas petition.

Delays in justice at the federal court level for killers such as Mallett have been more the rule than the exception, AG **Jay Nixon** said. From the date of an offense, it typically takes at least a decade for an inmate to face justice.

Nixon, vice chair of the criminal law committee for the National Association of Attorneys General, successfully lobbied this year for changes in a law designed to speed the federal appeals process for capital cases. Signed by the president, the new law contained in the anti-terrorism bill:

- Sets deadlines for federal courts to act on appeals by death row inmates.
- Sets a one-year deadline for filing federal appeals on death penalty cases and a six-month deadline for death row inmates represented by lawyers.
- Requires federal judges to defer to state court decisions unless they are contrary to federal law or involve an unreasonable application of federal law.

DRUNKEN DRIVING

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officer may have to actually see the drunk driving or have an eyewitness. In most instances, there will be evidence.

However, there will be times when the arriving officer only finds a disabled vehicle or the drunk passed out in the vehicle. These cases may not be prosecutable.

While this change may make prosecutors' jobs tougher, they still can prove — through circumstantial evidence — that the drunk was driving while intoxicated. One scenario:

A car is found in a field covered by fresh snow. The officer passed the location 10 minutes ago and saw no vehicle. On inspection, the officer finds no footprints, only the suspect, drunk behind the steering wheel. The engine is off, but the gear shift is in drive. These circumstances can prove beyond a reasonable doubt that the suspect was driving while intoxicated.

RESISTING ARREST

CONTINUED from Page 1

motorist fled when the officer was trying to make a simple traffic stop could not be prosecuted as a "resisting arrest" offense because no "arrest" was being attempted.

The Constitution allows an officer to stop and detain individuals for arrest and for investigative purposes such as in a *Terry* stop. While most traffic stops do not result in an actual arrest, caselaw gives officers the right to detain motorists until they have completed the investigation, written a traffic citation or both.

Under Missouri law, citizens have an obligation to submit to an arrest, even if it's improper. If the arrest is found to be unlawful, there are remedies for the suspect.

However, for the new crime of resisting other than an arrest, the stop **must** be lawful. If an officer makes a *Terry* stop and the suspect resists, the suspect is not guilty of a crime unless the *Terry* stop was lawful (based on reasonable suspicion).

While not clear, it is reasonable to assume that the law regarding actual arrests has not changed and that a suspect is guilty of resisting a custodial arrest, regardless of the legality of that arrest.

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UPDATE: CASE LAWS

U.S. SUPREME COURT

Whren v. United States
116 S.Ct. 1769
June 10, 1996

The court seemed to reject the pretext doctrine by holding that a temporary detention of a motorist on probable cause he has violated traffic laws does not violate the Fourth Amendment even if a reasonable officer would have stopped the motorist without other law enforcement objectives. The court rejected the argument that ulterior motives can invalidate police conduct justified by probable cause. This case seems to be consistent with Missouri cases rejecting the doctrine.

United States V. Ursery
116 S.Ct. 2135
June 24, 1996

The Fifth Amendment's double jeopardy clause does not prohibit the government from bringing parallel criminal prosecutions in *in rem* forfeiture actions. In rem forfeiture does not constitute punishment for double jeopardy purposes so long as the legislature intended the forfeiture proceedings to be civil in nature and the procedures are not clearly so punitive in form and effect as to render them criminal despite the legislature's contrary intent.

MISSOURI SUPREME COURT

State V. Faye Copeland
No. 73774
Mo.banc, Aug. 20, 1996

The trial court did not err in rejecting a psychologist's guilt phase testimony that the defendant suffered from battered spouse syndrome at the time of the murders.

The defense conceded it did not intend to rely on the defense of mental disease or defect or diminished capacity. Instead, the defense claimed the testimony was proposed to be offered on issues regarding the defendant's knowledge of the situation and her intent or lack thereof to commit criminal conduct.

The testimony was inadmissible under Chapter 552 and under Section 563.033 regarding matters of self-defense. Also, the evidence was not admissible to show duress since there is no legislative authority for admitting such testimony on that defense.

State v. Michael Taylor
No. 77365
Mo.banc, Aug. 20, 1996

The defendant was not denied the benefit of a plea bargain when he was sentenced by a judge who had not accepted his guilty plea. Although it is preferable for the judge to whom a plea is made to sentence the defendant, sentencing by a different judge does not create manifest injustice. The determining factor is whether the sentencing judge is familiar with the prior proceedings and can make an informed ruling on sentencing.

EASTERN DISTRICT

State v. Della M. Hill
No. 68496
Mo.App., E.D., July 23, 1996

There was sufficient evidence of the defendant's convictions for possession of a controlled substance despite the argument that the police only recovered trace elements of marijuana and cocaine.

Police found a burned butt of a marijuana cigarette in an ashtray on the coffee table, a "shake tray" under the couch and an envelope containing marijuana seeds. They also found a razor blade and a straw caked with cocaine residue in a compact.

Marijuana found in the defendant's house weighed about .31 grams. The cocaine, which was immeasurable, was consumed and destroyed during a test that identified it as cocaine.

The defendant argued there was insufficient evidence of her knowledge because only minuscule quantities were discovered. The court found sufficient evidence to sustain the possession-of-marijuana count since drug paraphernalia and small quantities of pot found throughout the home gave rise to a reasonable inference that the defendant knew marijuana was there.

On the possession-of-cocaine counts, the defendant was tried under an accomplice liability theory. Under the totality of circumstances, there was sufficient evidence from which a reasonable juror might have found the defendant knew cocaine was in her home.

The court did not commit plain error in overruling a motion to suppress evidence. The defendant argued the search warrant was insufficient to establish probable cause since it relied on information from an anonymous informant who had smelled marijuana inside the house and had seen pot and drug paraphernalia there in the past. Within the four corners of the affidavit, there was sufficient information to support a finding of probable cause.

UPDATE: CASE LAWS

State v. Janet L. Candela
No. 67096
Mo.App., E.D., July 23, 1996

The trial court did not err in allowing opinion testimony of five expert witnesses that the child victim suffered from shaken infant syndrome or shaken impact syndrome.

Contrary to the defendant's argument, a state expert testified the syndrome was an accepted syndrome or diagnosis in the medical community. All of the state's witnesses were consistent in their definitions and causes of the syndromes, symptom descriptions and the ages in which the syndromes appear. This syndrome has also been implicitly recognized by Missouri courts as a valid diagnosis.

State v. Maurice Foster
No. 67407
Mo.App., E.D., Aug. 13, 1996

The court reversed the conviction of unlawful use of a weapon (carrying a concealed tire knocker) for insufficient evidence. For purposes of Section 571.030.1, the term weapon is not defined. The determination of whether an object other than a knife, firearm or blackjack is a weapon within the meaning of Section 571.030.1 is dependent on several factors:

- The nature of the instrument itself;
- The circumstances under which it is carried, including time, place and situation in which the defendant is found in possession;
- How it is carried;
- The person carrying it; and
- Perhaps other factors such as possible peaceful uses for which the possessor might have used it.

The court did not reach the issue of whether the tire knocker was a weapon as contemplated by the statute because it did not find sufficient evidence that the defendant acted "knowingly."

The defendant argued there was insufficient evidence he knew the tire knocker was under the seat of the car, which was registered to another person, to submit that issue to the jury. There was no direct evidence the defendant had seen, handled or possessed the knocker or had placed anything under the driver seat.

The state established that the defendant occupied the seat under which the knocker was found, got out of the car and gripped an unseen object behind his back when he was stopped by police, fled from police in the car, abandoned it and fled on foot, and gave a false exculpatory statement about who was driving. The defendant's photo was in an album on a seat.

State v. Samual Aye
No. 65480
Mo.App., E.D., Aug. 27, 1996

In a prosecution for possession of cocaine, the court erred in allowing the state to introduce evidence of the defendant's prior convictions of possession of cocaine.

During defense testimony, the defendant testified about the prior conviction. During cross-examination, the state marked the court records of the prior convictions as exhibits and offered them into evidence. The state reasoned the documents were offered for impeachment and credibility purposes as well as to show intent and knowledge. The court found that the defendant's admission of the convictions on direct examination served the impeachment of credibility purposes.

The convictions were not admissible as substantive evidence of knowledge since the defendant's knowledge of cocaine was not in controversy. The defendant testified the police planted the cocaine on him. He did not deny knowing what cocaine was.

While the prior convictions may have been logically relevant, they were not legally relevant. The court also ruled the trial court erred in submitting an instruction on MAI-Cr3d 310.12 allowing the state to use the defendant's prior convictions to prove intent or knowledge.

WESTERN DISTRICT

State v. Robert L. White
No. 51927
Mo.App., W.D., Aug. 13, 1996

Neither the double jeopardy clause nor collateral estoppel barred the defendant's conviction for possession of a controlled substance when the defendant also was charged and acquitted of misdemeanor littering charges in the same incident. The court relied on *United States v. Dixon,* 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed. 2d 556 (1993), in which the Supreme Court rejected the "same conduct" test set forth in *Grady v. Corbin*, and reaffirmed that the proper test for double jeopardy is the "same element" set out in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 2d 306 (1932). The court noted there is a collateral estoppel aspect to double jeopardy that may bar a subsequent prosecution where the state has **lost** the first prosecution even if the *Blockburger* test is satisfied.

UPDATE: CASE LAWS

State v. Mark Blane Eighinger
No. 50081
Mo.App., W.D., Aug. 13, 1996

The trial court did not err in admitting evidence from the defendant's confession when he stated he desired to pay for his offense with his life. The defendant himself introduced the portion of the confession in which he stated he should pay for his crime in the same manner as the victim did. Also, the court rejected the defendant's argument that this constituted improper lay opinion evidence.

The defendant also argued the trial court erred in overruling his motion for mistrial when the prosecutor asked an FBI agent whether he had asked the defendant about a "sexual encounter" with the victim. The defendant said this introduced inadmissible evidence of other crimes.

The court ruled the state did not offer the evidence for this purpose but rather it was introduced when a defense witness read to the jury the written confession the defendant had given police. The defendant confessed he had removed the victim's clothes to make it appear she had been raped and he did not rape or sexually abuse her.

When the FBI agent took the stand, the prosecutor went over the confession in detail and repeatedly asked the agent whether he had asked the defendant about various matters at the time of the statement. During this questioning, the prosecutor asked if the agent had questioned the defendant about the sexual encounter. While the question was objectionable, the court found it was not asked in bad faith but was asked to obtain testimony about how the crime and confession occurred, and to show an attempt to conceal the crime.

State v. Regis C. Murdock
No. 50453
Mo.App., W.D., Aug. 13, 1996

The trial court did not err in denying a motion to suppress a statement. The defendant argued he was illegally arrested without probable cause when police stopped him and asked him to accompany them to the police station for questioning.

For a defendant to show a statement was involuntarily given, he must show evidence of coercive police activity. However, the evidence did not show coercion by officers nor any restraint by the defendant.

The defendant voluntarily went to the station and was free to leave the questioning at any time.

Although the defendant indicated a preference to ride to the station with his foster mother, the police said they would rather have him ride with them. The court easily could have found that the defendant, in his desire to act innocent, believed he would improve his chances of persuading police of this innocence by being cooperative.

SOUTHERN DISTRICT

State v. Stanley Ehnes
No. 20379
Mo.App., S.D., July 31, 1996

The trial court did not violate the defendant's constitutional rights by "forcing him" to proceed *pro se* without appointing a public defender pursuant to Section 600.086 and obtaining a written waiver pursuant to Section 600.051.

The defendant applied and received representation from the public defender. After his mother posted a $2,000 cash bond, the public defender withdrew, noting the defendant no longer was qualified for her services. The court then released the defendant on his own recognizance and refunded his mother.

The defendant refused to reapply for public defender services and failed to retain legal representation. The court held that there was no duty on the trial court to *sua sponte* determine the defendant's indigence. It is the initial responsibility of the public defender to determine eligibility under Section 600.086.3; the judiciary is to intervene only on appeal of the public defender's adverse decision. The court repeatedly encouraged the defendant to reapply for representation. He declined.

The defendant argued that his waiver of right to counsel was ineffective because it was not in writing. While Section 600.051 requires a written waiver in cases of an express waiver of counsel, the defendant refused to make an express waiver of counsel. The defendant clearly stated he would not waive his rights, yet he made no attempt to hire a lawyer or apply for a public defender.

The court ruled the defendant cannot purposely refuse to hire a lawyer and then complain when his trial starts without one. The court held pre-trial hearings to determine whether the defendant had retained counsel and the court repeatedly warned the defendant that if he showed up at trial without an attorney, he would have to represent himself. There was ample evidence that the defendant's waiver of counsel was knowingly and intelligently made.

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UPDATE: CASE LAWS

State v. Arthur Armstrong
No. 20735
Mo.App., S.D., Aug. 30, 1996

In this appeal from a first-degree murder conviction, the defendant challenged MAI-Cr3d 310.50 instructing the jury that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct.

The court affirmed the ruling and found that no plain error was made in connection with the jury instructions.

Besides *State v. Erwin,* the court relied on the recent Supreme Court case of *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996) which upheld language substantially similar to that found in Missouri's instruction.

State v. David Taylor
No. 18754
Mo.App., S.D., Aug. 20, 1996

In a prosecution for second-degree murder, the court erred in admitting evidence of the defendant's intoxication.

The defendant wished to admit evidence of his intoxication to explain his conduct. The court refused the evidence based on *State v. Erwin*, 848 S.W2d 476 (Mo ban 1993). The defendant wanted to rebut inferences raised by the state that the defendant showed consciousness of guilt.

The court found that, based on inferences the state raised, the defendant should have been allowed to rebut them by showing his level of intoxication. The court concluded that evidence of intoxication was relevant, not to show a lack of mental state but to explain his conduct.

A dissenting judge found that the defendant did not preserve the issue for appellate review and that the evidence was precluded under *State v. Erwin*.

Elizabeth Ziegler, executive director of the Missouri Office of Prosecution Services, prepares the Case Law summaries for Front Line.